Syarikat Panon Sdn Bhd v Zecon Engineering Works Sdn Bhd

HIGH COURT (KUCHING) — CIVIL SUIT NO 22–63 OF 2005-III(I)
CLEMENT SKINNER J
27 JULY 2005

Civil Procedure — Injunction — Application for interlocutory injunction — Injunction sought to restrain defendant from interfering with possession of site by plaintiff — Whether bona fide serious issues disclosed — Whether defendant was a trespasser — Whether damages an adequate remedy — Where justice of case lies — Conduct of the parties —Undertaking in damages

The defendant was one of the sub-contractors engaged to undertake a portion of the sub-contract works in relation to a building project in Kuching. Pursuant to a Letter of Appointment dated 9 October 2002, the defendant in turn engaged the plaintiff as a sub-sub contractor to undertake a portion of the sub-contract works consisting of the Faculty of Resource Science and Technology external laboratory ('the FRST-EL building'), the Centre for Student Development ('CSD building'), Infrastructural Related Works and External Works (the 'sub-sub contract works'). The defendant retained possession and control of the entire sub-contract site but gave to the plaintiff and other sub-sub contractors possession and control of such part of the sub-contract site from time to time as may be required by the plaintiff and other sub-sub contractors to commence and proceed with the execution of the works sub-contracted out to them. Some time in November 2004, the plaintiff allegedly encountered some 'contractual problems' with the defendant pertaining to the execution of two items of the sub-sub contract works, namely the FRST-EL building and the CSD building thereby resulting in negotiations between them for the defendant to take over all the works necessary to complete the FRST-EL building and the aluminium windows and glazing works for the CSD building ('the disputed works'). It was the plaintiff's understanding that in agreeing to the defendant taking over the disputed works, the plaintiff would be paid certain sums of money for works already executed by the plaintiff in respect of the disputed works. As it turned out, the defendant physically took over the disputed works but the plaintiff did not receive the payment sought. Approximately four months after the defendant took over the disputed works, the plaintiff contended that the defendant had taken over the disputed works without the plaintiff's agreement and as such, the defendant had acted unlawfully and the plaintiff sought to 'take back' the disputed works which would be returned to the defendant only upon settlement of the plaintiff's claims of RM6,011,738. The plaintiff tried to 'take back' the disputed works by embarking on various courses of action to physically obstruct the access to the sites. The plaintiff commenced legal action against the defendant for the recovery of RM3.1 million being outstanding progress payments and payment for variation orders undertaken in respect of the sub-sub contract works executed by the

plaintiff. Essentially, the plaintiff was alleging that the defendant was in breach of contract. The plaintiff applied for an interlocutory injunction to restrain the defendant from interfering with the possession by the plaintiff of the site of the sub-sub contract works. It was the plaintiff's stand that : (i) the defendant's act of taking over the disputed works without the agreement of the plaintiff amounted to an act of trespass because the plaintiff was entitled in law to exclusive and uninterrupted possession of the site of the sub-sub contract works; (ii) where trespass is continuing, damages are not an adequate remedy because the law will protect an unlawful invasion of proprietary or possessory right; and (iii) the justice of the case was so overwhelmingly in the plaintiff's favour that it would override any doubts about the plaintiff's financial ability to meet its undertaking in damages.

Held, dismissing the application with costs:

(1) At this stage of the proceedings, the pleadings and evidence are still incomplete in that amendments can still be applied for, particularly with regards to the defendant's contention that the plaintiff had failed to plead a case in trespass and there was therefore no peg from which to hang its claim for the protection of an injunction (see para 50).

(2) The injunctions sought by the plaintiff could not be granted as a matter of course because the defendant had disputed that it was a trespasser and had in fact asserted that it had exclusive possession of the sub-sub contract site; *John Trenberth Ltd v National Westminster Bank Ltd* (1979) 39 P & CR 104 and *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483 distinguished. At this stage of the proceedings it was not possible for the Court to express a view on whether the defendant was a trespasser and guilty of a continuing trespass or whether the plaintiff had possessory rights to the site of the disputed works (see para 50); *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees' and Builders' Labourers' Federation & Ors* (1988) 83 ALR 385 distinguished.

(3) From the totality of the facts presented to the court, *bona fide* serious issues have been disclosed which were required to be tried. These issues are: (i) whether the plaintiff was entitled to exclusive possession of the site of the disputed works; (ii) whether the defendant was a trespasser or had interfered with the plaintiff's alleged rights of possession to the site of the disputed works; (iii) whether the taking over of the disputed works by the defendant was unlawful; (iv) whether the defendant was entitled to impose liquidated and ascertained damages in accordance with the sub-sub contract amounting to RM22.1 million for late completion including the disputed works taken over by the defendant; and (v) whether there was a total of RM3.1 million owing to the plaintiff by the defendant in respect of works executed by the plaintiff (see para 51).

(4) In respect of those parts of the sub-sub contract works over which there was no dispute and which the plaintiff remained responsible to execute, namely, the infrastructural related works and external works, there was no allegation or complaint raised by the plaintiff that it had been dispossessed of those works or that it was being denied access to the site on which those works were being executed, there was therefore no justification for the grant of an injunction in respect of those works (see para 53).

(5) During the seven months which the defendant had taken over the aluminium windows and glazing works in the CSD building, the defendant had completed the works, so there is no justification to grant an injunction in respect of those works (see para 54).

(6) In respect of the FRST-EL building, the defendant had put in its own workers and sub-contractors and had completed 75% of the work, as estimated by the defendant. It was in the best interest of both parties for the FRST-EL building to be completed as soon as possible since there were completion dates specified in the main contract and the sub-contract. Ifan injunction is granted to the plaintiff, the defendant would have to cease and abandon all its works, withdraw all its workers and those of its sub-contractors from the FRST-EL building which would cause further delays which would expose the defendant to claims in damages from the main contractor. Any delay or stoppage of work would not only affect the progress of work undertaken by the immediate parties to the dispute but also the work of other contractors thus triggering knock-on effects in that other sub-contractors, their workers and suppliers would also be affected, thus, opening up more disputes between the defendant and other parties (see para 45).

(7) If an injunction is granted and the plaintiff were to take over the works on the FRST-EL building, there would be dispute between the plaintiff and the defendant over the measurement of works and materials on site which would inevitably lead to further delay in the progress of works. Particularly since the negotiation for the defendant to take over the disputed works resulted from 'contractual problems' the plaintiff allegedly encountered with the defendant, there was no assurance that these problems would not resurface causing the disputed works to come to a halt even if the FRST-EL buiding works were to be handed back to the plaintiff (see para 56).

(8) On the other hand, even if the injuntion was not granted, the plaintiff's claim against the defendant for the recovery of monies which the plaintiff had already quantified as well as for damages, remains intact, particularly as a joint inspection had already been conducted to measure the materials on site (see para 57).

(9) There was no evidence to support the plaintiff's allegation that the defendant had behaved in an unreasonable, unjust and oppressive manner towards the plaintiff. The defendant's assertion of its contractual rights regarding the timeframe for completion and damages in the event of delay did not constitute oppressive conduct towards the plaintiff. Onthe other hand, the facts showed that having allowed the defendant to take over and get on with the disputed works for five months, the plaintiff subsequently embarked on actions to disrupt the defendant's works by blocking the only entrance to the FRST-EL building. The plaintiff's actions appeared to be targetted at putting pressure on the defendant through the disruption of its works rather than merely to reassert control and possession of the building site (see paras 58–60).

(10) In the face of the plaintiff's refusal to disclose its financial standing despite challenges by the defendant, the plaintiff had not satisfied the court that it was well able to meet its undertaking in damages. This was not a case where the justice of the case was so overwhelmingly in favour of the plaintiff that the court could dispense with such an undertaking. There was no merits in the plaintiff's argument that its claim of RM3.1 million against the defendant could be looked to, to meet its undertaking in damages as the defendant had denied and disputed that there was such an amount owing to the plaintiff. In the light of this and the value of the sub-sub contract works and the sums claimed by the parties, the plaintiff's undertaking in damages assumed a position of importance in the weighing of all relevant matters by the court. On the other hand, the defendant had demonstrated that it would be in a financial position to meet any award in damages which may be awarded against it, if the injunction is refused (see paras 61 –63).

[**Bahasa Malaysia summary**

Defendan adalah salah satu sub-kontraktor yang telah dilantik untuk menjalani sebahagian daripada kerja sub-kontrak berhubungan dengan satu projek pembangunan di Kuching. Di bawah satu surat perlantikan yang bertarikh 9Oktober 2002, defendan telah melantik plaintif sebagai sub-kontraktor untuk menjalani sebahagian daripada kerja-kerja sub-kontrak yang terdiri daripada makmal luar Fakulti Sumber Sains dan Teknologi ('bangunan FRST-EL'), Pusat Perkembangan Pelajar ('bangunan CSD'), Kerja yang berkaitan dengan Infrastruktur dan Kerja Luar ('kerja-kerja sub-sub-kontrak'). Defendan kekal memegang milikan dan kawalan keseluruhan tapak kerja-kerja sub-kontrak tersebut tetapi telah menyerahkan kepada plaintif dan sub-sub kontraktor yang lain milikan dan kawalan bahagian yang tertentu tapak kerja sub-kontrak tersebut dari masa ke semasa apabila diperlukan oleh plaintif dan sub-sub kontraktor yang lain untuk memulakan dan meneruskan dengan pelaksanaan kerja-kerja yang telah disub-kontrakkan kepada mereka. Dalam bulan November

2004, plaintif kononnya telah menghadapi 'masalah kontrak' dengan defendan berhubungan dengan pelaksanaan dua daripada kerja-kerja sub-sub kontrak iaitu bangunan FRST-EL dan bangunan CSD dan akhirnya kedua-dua pihak telah berbincang agar defendan dibenarkan untuk mengambil alih kesemua kerja untuk menyelesaikan bangunan FRST-EL dan kerja-kerja jendela aluminium serta kerja-kerja meringas bangunan CSD ('kerja-kerja yang dipertikaikan'). Plaintif mempercayai bahawa sekiranya ia membenarkan defendan mengambil alih kerja-kerja yang dipertikaikan tersebut, plaintif akan dibayar wang untuk kerja-kerja yang telah dilaksanakan oleh plaintif berhubungan dengan kerja-kerja yang dipertikaikan tersebut. Walau bagaimanapun, setelah defendan mengambil alih kerja-kerja yang dipertikaikan tersebut, plaintif tetap tidak menerima bayaran yang dikehendaki. Lebih kurang empat bulan setelah defendan mengambil alih kerja-kerja yang dipertikaikan tersebut, plaintif mengatakan bahawa defendan telah mengambil alih kerja-kerja yang dipertikaikan tersebut tanpa persetujuan plaintif dan oleh itu ianya adalah menyalahi undang-undang dan plaintif berniat mengambil balik kerja-kerja yang dipertikaikan tersebut dan ianya hanya akan dipulangkan kepada defendan jikalau defendan menjelaskan tuntutan plaintif sebanyak RM6,011,738. Plaintif cuba mengambil balik kerja-kerja yang dipertikaikan tersebut dengan mengambil tindakan yang menghalang tempat ke tapak kerja. Plaintif telah memulakan tindakan guaman terhadap defendan untuk mendapat balik wang berjumlah RM3.1 juta yang merupakan bayaran berperingkat dan bayaran untuk pesanan perubahan untuk kerja-kerja sub-sub kontrak yang dilaksanakan oleh plaintif. Plaintif telah memohon satu injunksi interlokutori untuk menghalang defendan agar tidak mengganggu plaintif daripada memiliki tapak kerja sub-kontrak tersebut. Pendirian plaintif adalah: (i) tindakan defendan dalam mengambil alih kerja-kerja yang dipertikaikan tanpa persetujuan plaintif merupakan satu perbuatan pencerobohan kerana plaintif berhak di sisi undang-undang untuk memiliki tapak kerja sub-sub kontrak secara eksklusif dan tidak diganggu; (ii) di mana pencerobohan adalah berlanjutan, gantirugi bukannya pampasan yang memadai kerana undang-undang akan melindungi pencerobohan hakmilik yang menyalahi undang-undang; dan (iii) oleh kerana keadilan kes ini memihak kepada plaintif secara ketaranya ianya mengatasi segala keraguan akan keupayaan plaintif dari segi kewangan untuk menunaikan akujanji gantirugi yang diberikan oleh plaintif.

Diputuskan, menolak permohonan dengan kos:

(1) Setakat ini dalam prosiding, pliding dan keterangan masih tidak lengkap, oleh itu pindaan masih boleh dipohon, khususnya berhubungan dengan dakwaan defendan bahawa plaintif tidak memplidkan kes pencerobohan, maka tidak wujudnya kausa di mana plaintif berhak memohon perlindungan suatu injunksi (lihat perenggan 50).

(2) Injunksi-injunksi yang dipohon oleh plaintif tidak boleh dibenarkan sebegitu sahaja kerana defendan telah menafikan bahawa ia adalah

penceroboh dan defendan telah menegaskan bahawa sebenarnya ia mempunyai pemilikan secara eksklusif akan tapak kerja-kerja sub-kontrak tersebut; *John Trenberth Ltd v National Westminster Bank Ltd* (1979) 39 P& CR 104 dan *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483 dibezakan. Setakat ini dalam prosiding, ianya mustahil untuk Mahkamah ini menyatakan pandangannya sama ada defendan adalah penceroboh dan bersalah kerana melakukan pencerobohan yang berlanjutan atau sama ada plaintif mempunyai hakmilik ke atas tapak kerja-kerja yang dipertikaikan tersebut (lihat perenggan 50); *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees'and Builders' Labourers' Federation & Ors* (1988) 83 ALR 385 dibezakan.

(3) Dari keseluruhan fakta-fakta yang dikemukakan kepada Mahkamah, ianya didapati isu-isu *bona fide* yang serius yang harus diperbicarakan telah didedahkan. Isu-isu ini adalah: (i) sama ada plaintif berhak kepada milikan eksklusif tapak kerja-kerja yang dipertikaikan tersebut; (ii) sama ada defendan adalah penceroboh ataupun ianya telah mengganggu hakmilik plaintif kepada tapak kerja-kerja yang dipertikaikan tersebut; (iii) sama ada pengambilalihan kerja-kerja yang dipertikaikan tersebut oleh defendan menyalahi undang-undang; (iv) sama ada defendan berhak untuk mengenakan gantirugi jumlah tertentu mengikut sub-sub kontrak dalam jumlah sebanyak RM22.1 juta untuk penyelesaian lewat termasuk untuk kerja-kerja yang dipertikaikan tersebut yang telah diambil alih oleh defendan; dan (v) sama ada terdapat jumlah sebanyak RM3.1 juta terhutang kepada plaintif oleh defendan berhubungan dengan kerja yang di laksanakan oleh plaintif (lihat perenggan 51).

(4) Berhubungan dengan kerja-kerja sub-kontrak yang tidak dipertikaikan dan yang mana plaintif masih diwajib untuk menyelesaikan, iaitu Kerja yang berkaitan dengan Infrastruktur dan Kerja Luar, plaintif tidak mengadu bahawa ia telah dihalau atau dihalang memasuki tapak di mana kerja-kerja tersebut dilaksanakan, oleh itu tidak terdapat justifikasi untuk membenarkan injunksi berhubungan dengan kerja-kerja tersebut (lihat perenggan 53).

(5) Dalam tempoh tujuh bulan setelah defendan mengambil alih kerja-kerja jendela aluminium dan kerja-kerja meringas dalam bangunan CSD tersebut, defendan telah menyelesaikan kerja-kerja tersebut, oleh itu tidak terdapat justifikasi untuk membenarkan injunksi berhubungan dengan kerja-kerja tersebut (lihat perenggan 54).

(6) Berhubungan dengan bangunan FRST-EL, defendan telah menempatkan pekerja-pekerjanya sendiri dan sub-kontraktor yang lain dan telah menyelesaikan 75% daripada kerja-kerja tersebut, menurut anggaran defendan. Oleh itu, ianya adalah dalam kepentingan kedua-dua pihak bahawa bangunan FRST-EL tersebut diselesaikan secepat mungkin memandangkan terdapatnya tarikh penyelesaian yang ditetapkan dalam kontrak utama dan sub-kontrak. Sekiranya injunksi dibenarkan, defendan

terpaksa memberhentikan and meninggalkan kesemua kerjanya, menarik balik semua pekerja-pekerjanya dan juga pekerja-pekerja sub-kontraktor yang lain dari bangunan FRST-EL dan ini akan mengakibatkan kelewatan yang selanjutnya yang akan mendedahkan defendan kepada tuntutan gantirugi daripada pihak kontraktor utama. Apa-apa kelewatan dan perhentian kerja akan menjejaskan kerja-kerja plaintif dan defendan serta juga kerja kontraktor-kontraktor yang lain, maka, terdapatnya akibat yang berleluasan (knock-on effects) kerana kerja sub-kontraktor yang lain, pekerja-pekerja mereka serta pihak yang menyediakan langganan (supplier) mereka juga akan terjejas dan ini akan mengakibatkan pertikaian yang lain antara defendan dan pihak-pihak yang lain (lihat perenggan 45).

(7) Sekiranya injunksi dibenarkan dan plaintif dibenarkan mengambil alih kerja-kerja di bangunan FRST-EL tersebut, akan berlaku pertikaian diantara plaintif dengan defendan mengenai penghitungan kerja-kerja yang telah dilaksanakan dan bahan-bahan yang berada di tapak kerja dan ini akan menyebabkan kelewatan yang selanjutnya dalam kerja-kerja. Khususnya kerana perbincangan untuk pihak defendan mengambil alih kerja-kerja yang dipertikaikan timbul dari 'masalah kontrak' yang plaintif dikatakan menghadapi dengan defendan, tidak terdapat jaminan bahawa masalah tersebut tidak akan timbul sekali lagi dan kerja-kerja yang dipertikaikan mungkin berhenti langsung jikalau kerja-kerja di bangunan FRST-EL tersebut diserahkan balik kepada plaintif (lihat perenggan 56).

(8) Sebaliknya, jika injunksi tersebut tidak dibenarkan, tuntutan plaintif terhadap defendan untuk mendapat balik wang yang telah ditentukan oleh plaintif serta gantirugi, kekal wujud, khususnya, kerana pemeriksaan bersama telahpun dijalani untuk menentukan bahan-bahan yang berada di tapak kerja (lihat perenggan 57).

(9) Tidak terdapat bukti yang menyokong dakwaan plaintif bahawa defendan telah bertindak secara tidak munasabah, tidak adil dan secara menindas terhadap plaintif. Penegasan defendan terhadap hak kontraknya mengenai tempoh masa untuk penyelesaian dan gantirugi sekiranya terdapat kelewatan tidak merupakan kelakuan menindas terhadap plaintif. Sebaliknya, fakta-fakta menunjukkan bahawa setelah membenarkan defendan mengambil alih kerja-kerja yang dipertikaikan tersebut selama lima bulan, berikutannya plaintif telah mengambil pelbagai tindakan untuk mengganggu kerja-kerja defendan dengan menghalang tempat masuk ke bangunan FRST-EL tersebut. Tingkah laku plaintif yang sedemikian nampaknya berniat untuk meletakkan tekanan ke atas defendan dan bukan sahaja berniat untuk mengambil balik milikan serta kawalan tapak kerja tersebut (lihat perenggan 58–60).

(10) Oleh kerana keengganan plaintif untuk mendedahkan kedudukan kewangannya walaupun dicabar oleh defendan, plaintif telah gagal menyakinkan Mahkamah bahawa ia dapat menunaikan akujanji

gantiruginya. Ini bukan suatu kes di mana keadilan kes adalah memihak kepada plaintif secara ketaranya di mana Mahkamah tidak memerlukan akujanji gantirugi. Ianya didapati bahawa tiada merit dalam dakwaan plaintif bahawa tuntutannya terhadap defendan yang berjumlah RM3.1 juta boleh diambil kira, untuk tujuan menunaikan akujanji gantiruginya kerana defendan telah menafikan dan mempertikaikan bahawa terdapat jumlah sedemikian terhutang kepada plaintif. Memandangkan perkara ini serta nilai kerja-kerja sub-sub kontrak dan jumlah yang dituntut oleh kedua-dua pihak, akujanji gantirugi plaintif adalah sangat mustahak dalam mempertimbangkan semua perkara yang relevan oleh Mahkamah. Sebaliknya, defendan telah menunjukkan bahawa ia berada dalam kedudukan kewangan di mana ia dapat menunaikan sebarang perintah gantirugi yang dibuat terhadapnya, sekiranya injunksi tersebut ditolak (lihat perenggan 61–63).]

Notes

For cases on application for interlocutory injunctions, see 2(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2563–2570.

Cases referred to

Concrete Constructions (NSW) Pty Ltd v Australian Building Construction Employees' and Builders' Labourers' Federation & Ors (1988) 83 ALR 385 (distd)
John Trenberth Ltd v National Westminster Bank Ltd (1979) 39 P & CR 104 (distd)
Keet Gerald Francis Noel John v Mohd Noor Abdullah & Ors [1995] 1 MLJ 293 (refd)
Woollerton & Wilson Ltd v Richard Costain Ltd [1970] 1 All ER 483 (distd)

Mekanda Sandhu (Satinder Sandhu with him) (Sandhu & Co) for the plaintiff.
Sim Hui Chuang (Lim Lip Tze with him) (Reddi & Co) for the defendant.

Clement Skinner J:

[1] This is the hearing of an application for an interlocutory injunction by Syarikat Panon Sdn Bhd ('the plaintiff') against Zecon Engineering Works Sdn Bhd ('the defendant'). The injunction is sought in the context of a dispute which has arisen in the course of a construction contract. It is better that I state the facts leading up to this application before I describe the injunctive relief which the plaintiff seeks.

[2] University Malaysia Sarawak is constructing certain buildings in Kuching, Sarawak known as the Unimas Development Project Phase 1 Stage 1 (hereafter 'the main contract works') which it awarded to a company called Taisei-Zecon Joint Venture (hereafter 'TZJV') as the main contractor. TZJV has in turn engaged the defendant as its sub-contractor to undertake a portion of the main contract works relating to certain Civil, Building and Related Works (hereafter 'the sub-contract works'). The defendant in turn engaged the plaintiff to undertake a portion of the sub-contract works consisting of:

(a) The faculty of Resource Science and Technology external laboratory (hereafter 'the FRST-EL building');

(b) the centre for student development (hereafter 'the CSD building');

(c) infrastructural related works; and

(d) external works.

[3] I will refer to the four items of works described above collectively as the 'sub-sub contract works'.

[4] The plaintiff was appointed as sub-sub contractor of the defendant by a letter of appointment dated 9 October 2002 ('the letter of appointment'), cl7 of which incorporates the form of the sub-general contract and appendices entered into between TZJV and the defendant as the conditions of the sub-sub contract entered into between the plaintiff and the defendant 'but only for a specific section of the works'. In fact cl 22 of the letter of offer states that a formal sub-sub general contract agreement was being drafted for execution but until then, the letter of acceptance and the sub-general contract and appendices, the drawings and technical specifications shall constitute a binding contract between the parties.

[5] The total sum payable to the plaintiff for the sub-sub contract works was RM48.2 million which is described as a 'fixed lump sum' (without final measurement) in the letter of acceptance. The plaintiff was to be paid this sum through progress payments as the sub-sub contract works progressed, in the manner set out in cl 11 of the letter of acceptance.

[6] From the documents before the court and in particular appendix A (exh WDC1) to the letter of acceptance, the works to be performed under the sub-sub contract were divided into various sections of works, so that the works to be performed by the plaintiff in respect of the Infrastructural Related Works fall within section 1/A and 1/B; while the works relating to the external works fall within section 2/A and 2/B; while the works relating to the FRST-EL building and the CSD building fall within section 2/B of the sub-sub contract works.

[7] By cl 8 of the letter of acceptance the plaintiff was required to commence and to complete the sub-sub contract works by the following dates:

The time for completion pursuant to cl 43.1 of the main contract for the various sections of the works are as follows:

(a) Commencement date of sections 1/A and 1/B: 15 May 2002.

(b) Completion of section 1/A and 1/B: 20 months from the commencement date.

(c) Commencement date of section 2/A and 2/B: 15 August 2002.

(d) Completion of section 2/A and 2/B: 23 months from the commencement date.

[8] Notwithstanding what is stated in cl 8 regarding the time of commencement and completion of the sub-sub contract works, the plaintiff says that it was handed over the site for the infrastructural related works and external works 'progressively' from 15 October 2002 to April 2005; that it was given possession of the site for the FRST-EL building on 15 November 2003; and that it was handed possession of the site for the CSD building on 15December 2002. According to the plaintiff, on being progressively given possession of these sites, it immediately commenced and proceeded with the execution of the items of relevant works.

[9] Under cl 18 of the letter of acceptance the plaintiff would be liable to pay liquidated and ascertained damages for late completion of the sub-sub contract works: in accordance with the sub-general contract between the main contractor and sub-general contractor, Zecon Engineering Works Sdn Bhd, proportioned down to the value of your sub-sub general contract.

[10] Before describing the dispute which has arisen between the parties, something needs to be said about the site on which the sub-sub contract works were to be carried out and the possession thereof. It is reasonably clear to me from what has been said in the affidavits that:

(i) TZJV is the main contractor, while the defendant is just one of the sub-contractors for part of the main contract works;

(ii) that to enable the defendant to undertake its sub-contract works, TZJV has given the defendant possession of such parts of the entire site (in accordance with cl 42.1 of the sub-general contract) as would enable it to commence and proceed with the execution of the sub-contract works (hereafter 'the sub-contract site');

(iii) that the sub-sub contract works which the plaintiff was engaged to execute forms only a part of the entire sub-contract works and that the defendant has engaged other sub-sub contractors whose workers also undertake work on the sub-contract site as well;

(iv) the defendant maintains that it retains possession and control of the entire sub-contract site, but gave to the plaintiff and other sub-sub contractors possession and control of such part of the sub-contract site from time to time as may be required by the plaintiff and other sub-sub contractors to commence and proceed with the execution of the works sub-sub contracted out to them.

[11] I think this is the position which the defendant has tried to portray in para 8 of Mr Kong Sin Huat's affidavit affirmed on 9 June 2005.

[12] Turning now to the dispute between the parties, the plaintiff alleges that in respect of the sub-sub contract works it executed and performed, it encountered delays in the payment of its monthly progress payments or the defendant failed to pay in accordance with the payment certificates. In this regard, the plaintiff alleges that it is now owed a sum of some RM1.2 million by the defendant.

[13] The plaintiff alleges that in the course of the execution of the sub-sub contract works the defendant had instructed the plaintiff to carry out variation works for which there is now a sum of RM1.8 million allegedly due from the defendant.

[14] It is the plaintiff's case that there is now a cumulative sum of RM3.1 million lawfully due and owing by the defendant to it under para 11 of the letter of acceptance. Accordingly the plaintiff alleges that the defendant is in breach of contract.

[15] The plaintiff further alleges that the defendant's delay in the payment or non-payment of the sums due to it has resulted in its cash flow being severely disrupted which in turn has adversely affected and delayed the progress of the works, for which it (the plaintiff) is not to be blamed. The plaintiff complains that despite various promises by the defendant that it would pay the RM1.2 million due on the payment certificates, it has not done so apart from tendering payment of RM250,000 some time on 16 May 2005 which the plaintiff eventually rejected.

[16] The plaintiff says that upon the completion of the sub-sub contract works, it will present a claim against the defendant for damages for delays in the progress of the sub-sub contract works directly caused by various acts of 'prevention' on the part of the defendant, delayed payment of the payment certificates, increase in the costs of building materials 'and other claims'.

[17] The defendant on its part, seriously disputes that it is to be blamed for the delay in the execution of the sub-sub contract works by the plaintiff and instead counters that the plaintiff has continually failed to carry out the sub-sub contract works with due expedition, diligence and without delay. The defendant has supported its allegation of the plaintiff's delay by exhibiting the repeated notices, reminders and warnings it sent to the plaintiff.

[18] With regard to the allegation that it withheld moneys due to the plaintiff which allegedly led to the latter suffering severe cash flow problems which in turn allegedly affected the progress of works, the defendant denies the allegation and instead asserts that it had assisted the plaintiff by giving it an advance payment of some RM4.8 million as well as making direct purchases of materials from suppliers on behalf of the plaintiff when requested to do so by the plaintiff and thereafter giving the plaintiff credit of between 30 to 45 days. The defendant says it maintains a running account with the plaintiff in

which it takes into account the amount(s) which the defendant has incurred on behalf of the plaintiff as well as the sums certified for payment to the plaintiff. The defendant further alleges that the plaintiff is now liable to it for substantial damages for delay in the completion of the sub-sub contract works which the defendant calculates at some RM22.1 million, which the defendant says far exceeds the alleged claim of the plaintiff. Besides the claim which it has against the plaintiff for damages for late completion, the defendant says that as a result of the plaintiff's delay it is exposed to or potentially liable for damages to or claims by its other sub-contractors who have been delayed by reason of the plaintiff's delay in completion of the sub-sub contract works. As far as the plaintiff's claims for variation of works are concerned, the defendant says that the plaintiff had not earlier objected to the certification of the relevant variation orders which were included in the payment certificates which the defendant had acted on. Accordingly the defendant maintains that no sums of money are owing and payable to the plaintiff as alleged or at all.

[19] The plaintiff of course denies that the defendant is entitled to claim any damages from it for the alleged delay in the completion of the sub-sub contract works and says there is no basis in law or otherwise for the defendant's claim of RM22.1 million. The plaintiff also denies that there is any running account between the plaintiff and the defendant as alleged and further points out that the RM4.8 million which it received as an advance payment from the defendant has been fully repaid to the defendant through deductions made from the progress payments due to the plaintiff.

[20] Some time in November 2004 the plaintiff says it encountered several contractual problems (but without identifying them) with the defendant on the execution of two items of the sub-sub contract works, namely, the FRST-EL building and the CSD building, with the result that the plaintiff and the defendant entered into negotiations with a view to the defendant taking over all the works necessary to complete the FRST-EL building and the aluminium window and glazing works only in the CSD building. I will refer to these two items of work as 'the disputed works'.

[21] The negotiations consisted both, of letters passing between the parties as well as meetings between their representatives. Although each party has its own interpretation of the letters passing and what was discussed or agreed at these meetings, for present purposes it is sufficient for me to say that it seems that the plaintiff was quite agreeable to the defendant taking over the disputed works, but it wanted to be paid certain sums of money in respect of the works it had already executed in respect of the disputed works. In particular, the plaintiff wanted the defendant to agree to pay it a total sum of RM5.5 million for both items of work (later revised to RM6 million). Thus, on 13 November 2004 the plaintiff wrote a letter to the defendant setting out its proposal for the defendant to pay the plaintiff RM5.5 million (and how that figure was arrived at) and ended its letter by saying that 'upon payment to us of the said amount of RM5,591,900 we shall hand over the two works wholly to you'.

[22] Things did not work out for the plaintiff the way it planned because in the events that have transpired, the defendant has taken over the disputed works but the plaintiff has not received the payment it wanted.

[23] It is pertinent to note that despite what the plaintiff had said in its letter of 13 November 2004 and also in some of its subsequent letters to the defendant about the disputed works not being handed over to the defendant until the plaintiff had been paid for them and a commercial agreement recording the terms of settlement had been executed, when the defendant did take over the disputed works the plaintiff was fully aware of what was happening on the ground between the parties which is that the defendant was physically taking over the disputed works as they happened, and it seems the plaintiff was quite content to allow the defendant to do so. I say this because when the plaintiff did not receive a response from the defendant to its letter of 13 November 2004, about the disputed works the plaintiff wrote to the defendant on 3 December 2004 stating, *inter alia*, that 'Pursuant to our agreement, we are to cease the above site works by tomorrow and immediately commence demobilisation on the two works. Please note that we shall complete demobilisation and hand over the two works to you on 10 December 2004 (Friday)'.

[24] The plaintiff's letter of 3 December 2004 provoked a response from the defendant who wrote back to the plaintiff on the same day requesting the plaintiff to hand over the disputed works by 8 December 2004 instead of 10December 2004 as suggested. The plaintiff did not agree to handing over the disputed works on 8 December 2004 as it wanted the financial matters to be sorted out first and requested for a meeting, which subsequently took place between the representatives of the two parties after which further correspondence passed between the parties in which the parties aired matters which were purportedly agreed or not agreed to.

[25] Then on 22 December 2004 the plaintiff wrote to the defendant in respect of the CSD building informing the defendant that 'upon your request, we are pleased to hand over the entire aluminium and glazing work' to the defendant 'effective from 22 December 2004'. In that same letter the plaintiff also informed the defendant that they: 'will not be responsible for any loss or damage to the aluminium and glazing and its associated works if any, since the entire work scope had been given back' to the defendant.

[26] With reference to the aluminium windows and glazing works in the CSD building which the defendant acknowledges it has taken over since 22December 2004, the defendant says it completed all the works that needed to be done in June 2005.

[27] As regards the FRST-EL building, on 23 December 2004 there was a joint inspection carried out by representatives of the plaintiff and the defendant to determine the materials on site. After that meeting the parties corresponded with each other about what the agreed sum should be for the materials on site,

but it seems the defendant took over all the work in respect of the FRST-EL building on or about 5 January 2005 because on 4 January 2005 the defendant wrote to the plaintiff informing it that: we officially inform that we shall take possession of the FRST-EL building on 05 January 2005, Wednesday. Our workers will be starting works on site tomorrow morning. On 5 January 2005 the plaintiff wrote back to the defendant but did not say anything about the plaintiff's notification of taking over the works. Instead the plaintiff asked the defendant to provide a revised price for the materials on site so that it would be incorporated into the 'Settlement Agreement'. The defendant did not immediately respond to the plaintiff's letter of 5 January 2005, but on 10 January 2005 the defendant wrote to the plaintiff stating that : we wish to confirm that both parties have mutually agreed that the defendant will take over and complete the remaining works for the FRST-EL building with effect from Wednesday, 05 January 2005. Then on 12 January 2005 the plaintiff wrote to the defendant stating that:

(a) on 10 January 2005 the defendant had 'partially take (sic) over the two works in accordance with the terms of the commercial agreement';

(b) the defendant's action of 'taking over of the two works has confirmed that there are no more outstanding issues' between the parties on the stages of completion of the two works and the amount of materials on site; and

(c) forwarded to the defendant for the first time the 'commercial agreement' purportedly for execution before the final hand over of the two works'.

[28] It is quite evident to me that the plaintiff was trying to shut the stable gate after the horse had bolted so to speak as by then, the defendant had since 22 December 2004 taken over the aluminium windows and glazing works in the CSD building and the FRST-EL building works since 5 January 2005.

[29] With reference to the works which it took over in respect of the FRST-EL building, the defendant's estimate that when it took over the works it was only about 30% complete but that since taking over, it has managed to complete about 75% of the works. This is disputed by the plaintiff who says it did most of the difficult work which in terms of difficulty, it estimates at 60%.

[30] After the defendant received the plaintiff's 'commercial agreement' for execution, the parties corresponded again with each other about it, but no commercial agreement has been signed to date.

[31] Some four months after the defendant took over the works, the plaintiff wrote to the defendant on 5 April 2005 stating that the defendant had taken over the disputed works 'without our agreement, and, therefore, unlawfully' and that the defendant had also not paid the plaintiff's claim of RM6 million. Accordingly, the plaintiff informed the defendant that in the circumstances,

in order to protect its legitimate interests, the plaintiff was 'taking back our two works', and that the plaintiff 'shall hand them over to you only upon your settlement of our claims of RM6,011,738'.

[32] As I said a moment ago, the plaintiff's decision to 'take back' the disputed works was a little belated, given the fact that the disputed works were taken over some four months earlier on 22 December 2004 and 5 January 2005 respectively.

[33] The plaintiff then tried to 'take back' the disputed works by embarking on the following course of action :

(1) Prior to 4 May, 2005 there was only one entrance to the FRST-EL building site (hereafter 'entrance No 1'). Some time in the afternoon of 4 May 2005 the plaintiff caused its excavator to dig a trench across entrance No 1 and then parked the excavator at the entrance to block it. According to the plaintiff, while its action would prevent unauthorised heavy vehicles from entering the site, it did not prevent egress and ingress of some 100 workers of the defendant and other sub-contractors working on the FRST-EL building. The defendant complains that the plaintiff's action resulted in machinery and vehicles being trapped on site, with 12 truck loads of concrete scheduled for 4 May 2005 being cancelled or stopped. Further, as the defendant regarded the lack of access to the site as a contravention of the regulations and requirements of the Department of Safety and Health, the defendant took immediate steps to create an alternative access to the FRST-EL building site (hereafter 'entrance No 2'). The defendant also lodged a police report on the matter. As a result of what the plaintiff had done, on 5 May 2005 the defendant issued instructions to prohibit four vehicles belonging to the Project Manager (Mr Wong Diong Chai), the Equipment Coordinator (Mr Wee Ah Hian), the Mechanic (Mr Chinnie Ak Jenggi) and the Building Coordinator (Mr Phang Hock Lim) from entering the site for seven days;

(2) On 6 May 2005 at about 9.45am the plaintiff caused a piling rig to be placed at entrance No 2, thereby effectively preventing vehicles and machinery to access the site, but not the workers. On the very same day the defendant with the knowledge of the police authorities caused the plaintiff's excavator and piling rig to be removed from entrance No 1 and entrance No 2 and be moved to the main entrance of the new Unimas Campus where the police has cordoned them off with police ribbons.

[34] On 19 May 2005 the plaintiff commenced legal action against the defendant. On the same day the plaintiff filed its application for injunctive relief in the following terms, giving the usual undertaking in damages:

(i) an order that the defendant by itself, its directors, sub-contractors, servants or agents, howsoever be restrained from interfering in any way whatsoever with the possession of the site of the works contracted to the plaintiff, namely, the FRST-EL building and the CSD building, Infrastructural Related Works and External Works until after the trial of this action or until further order of the court;

(ii) an order that the defendant by itself, its directors, sub-contractors, servants or agents, howsoever be restrained from interfering with the peaceful possession by the plaintiff of the site of its works until after the trial of this action or until further order of the court.

[35] One further point needs to be mentioned here. It is this: The defendant says that while it may have taken over the disputed works from the plaintiff, the latter continues to remain responsible and liable to complete the rest of the works concerning the CSD building, as well as the infrastructural related works and the external works component of the sub-sub contract works. The defendant also says that the plaintiff continues to have access to the CSD building and the site to complete such works. With that I turn to the contentions of the parties.

[36] It is the plaintiff's case that the defendant owes it a total sum of RM3.1 million in respect of progress payments and variation orders for the sub-sub contract works executed by it. While the plaintiff acknowledges that it entered into negotiations with the defendant and had agreed in principle to the defendant taking over the disputed works, the plaintiff maintains that the defendant took over the works without reaching an agreement with the plaintiff. According to the plaintiff its attempts to assert its possession of its site was thwarted by the defendant whom even barred the plaintiff's four key staff and vehicles from entering the site. Accordingly the plaintiff commenced this suit claiming, inter alia, for declarations that the defendant's act of taking over the disputed works was and is unlawful and that the defendant is not entitled to enter the site to carry out these works. Hence the plaintiff's application for prohibitory injunctions to restrain the defendant.

[37] Mr Mekanda Singh Sandhu, counsel for the plaintiff contends that the plaintiff should be granted the injunctions it seeks because the dispute between the parties has given rise to *bona fide* serious issues to be tried. Mr Sandhu further contends that the justice of the case favours the grant of an injunction to the plaintiff. According to Mr Sandhu, damages are not an adequate remedy to the plaintiff because at all material times the plaintiff was in lawful possession of the site for the sub-sub contract works and the agreement between the plaintiff and the defendant giving the plaintiff possession of the site has not been terminated; nor did the plaintiff agree to allow the defendant to take over the disputed works. It is Mr Sandhu's submission that the act of the

A defendant in taking over the disputed works without the agreement of the plaintiff amounted to an act of trespass because the plaintiff was in law entitled to exclusive and uninterrupted possession of the site of the sub-sub contract works. Mr Sandhu says a perusal of the sub-general contract (by which the plaintiff and the defendant are bound) shows that by cl 6 thereof, the plaintiff B was given complete site management. Under cl 8 thereof the plaintiff is required to complete the various sections of work within stipulated times, and under cl 18 liquidated and ascertained damages may be imposed on the plaintiff for late completion. Under cl 20 the plaintiff must observe stringent requirements in terms of quality, safety and diligence in carrying out the disputed works. C Accordingly it is Mr Sandhu's submission that the law will imply that the plaintiff must be given uninterrupted and exclusive possession of the sub-sub contract site so as to be able to carry out its contractual obligations. It is the plaintiff's case that where trespass is continuing, damages are not an adequate remedy because the law will protect an unlawful invasion of proprietary or D possessory rights.

[38] In support of what he says on behalf of the plaintiff, Mr Sandhu referred me to the following authorities: *Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483; *John Trenberth Ltd v National Westminster Bank Ltd* (1979) 39 P & CR 104; *Concrete Constructions (NSW) Pty Ltd v Australian Building Construction* E *Employees' and Builders' Labourers' Federation & Ors* (1988) 83 ALR 385.

[39] As far as the balance of justice is concerned, Mr Sandhu submitted that it came down in favour of the grant of an injunction to the plaintiff because in a case such as this, where there is a continuing unlawful interference of a F plaintiff's possessory right to property which, according to the plaintiff, is what happened here when the defendant unlawfully took over the disputed works without the agreement of the plaintiff, the court ought to grant an injunction as a matter of course. Mr Sandhu further contends that the defendant has behaved in an unreasonable, unjust and oppressive manner towards the plaintiff as the defendant, after unlawfully taking over the disputed works, without the G consent of the plaintiff and without terminating the agreement between the parties, has proceeded to impose liquidated and ascertained damages amounting to RM17.3 million for late completion of the sub-sub contract works including the disputed works, in addition to a counterclaim of RM4.7 million as loss and damage for completing the disputed works.

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[40] As far as the plaintiff's undertaking in damages is concerned, it is MrSandhu's submission that on the facts of this case, the justice of the case is so overwhelmingly in favour of the plaintiff that it overrides any doubts which may be raised about the plaintiff's financial ability to meet its undertaking I in damages. Mr Sandhu further points out that the plaintiff is owed some RM3.1 million by the defendant and so that amount would be available to the plaintiff to meet its undertaking in damages.

[41] Accordingly it is the plaintiff's case that in the circumstances, it is more convenient to maintain the *status quo* and to allow the plaintiff to fulfil its contractual obligations under its sub-sub contract without interference from the defendant by the grant of the injunctions now sought.

[42] The defendant opposes the grant of the injunctions sought by the plaintiff. Mr Sim Hui Chuang, counsel for the defendant takes the following points. First, he points out that in respect of those parts of the sub-sub contract works over which there is no dispute and which the plaintiff remains responsible to execute, namely, the infrastructural related works and external works, there is no allegation or complaint by the plaintiff that it has been dispossessed of these works or the site on which they are to be built or that it is being denied access to these works or site. So the question of an injunction to protect these works does not arise.

[43] Secondly, Mr Sim points out that in respect of the CSD building, all the aluminium windows and glazing works which it took over since 22 December 2004 have now been completed. So again there is no need for an injunction in respect of these works.

[44] Thirdly, with regard to the FRST-EL building, Mr Sim says that the defendant has taken over the works for some six to seven months (since January 2005) and in that time the defendant has put in its own workers and sub-contractors to complete a substantial portion of the entire works which the defendant now estimates at 75%. Mr Sim says that the plaintiff's application for injunctive relief, although couched in prohibitory terms will, if granted, effectively require the defendant to cease and abandon all its works, withdraw all its workers and that of its sub-contractors from the site and deliver or give possession of the FRST-EL building to the plaintiff which if it were ordered to do so, would lead to disastrous consequences on the site and to the defendant. According to Mr Sim, if the injunction is granted the defendant would sustain or be exposed to huge loss and damage. The plaintiff has already caused extensive delay and further delays can be expected. In the meantime the defendant is responsible to deliver up the completed works to the main contractor and will be exposed to a claim in damages from the main contractor. According to Mr Sim, the problems do not end there. If the injunction is granted and the defendant has to cease works, such cessation will have a knock-on effect, in that, not only would the defendant and its workers and suppliers be affected, so would its sub-contractors and their workers and suppliers thereby opening up more disputes between the defendant and other parties.

[45] Given the above scenario, it is Mr Sim's submission that if the injunction were not granted, the defendant would soon complete the FRST-EL building and if the plaintiff were to suffer any loss it would be for the loss of profit for the remaining work which it is not even required to incur expenses to earn.

[46] The defendant also says the injunction should not be granted as the plaintiff's ability to meet its undertaking in damages is seriously in doubt. The defendant has conducted a search on the plaintiff at the Companies Commission of Malaysia on 3 June 2005 and from the documents registered at the Commission as at 29 April 2005, the latest audited accounts filed by the plaintiff were those for the financial year ended 31 December 1999. According to the defendant this shows the plaintiff's poor financial standing. The defendant complains that it has, through its affidavits affirmed by Mr Kong Sin Huat on 9 June 2005 and 12 July 2005 repeatedly questioned the plaintiff's financial standing and has challenged it to produce and disclose its latest audited accounts to show its financial standing but the plaintiff steadfastly refuses to do so. Mr Sim points out that instead, the plaintiff prefers to show that it has the necessary financial ability to meet its undertaking in damages by relying on the following facts. Itwas able to repay the advance payment of RM4.8 million it received from the defendant, and it is owed RM3.1 million which it is claiming from the defendant. Further, the plaintiff says it intends to claim against the defendant a sum of RM10.7 million 'for damages for overstaying on site through delay caused by acts of prevention on the part of the defendant'.

[47] In contrast to the plaintiff's poor financial standing, the defendant says it is financially sound and well able to satisfy any damages which the court may eventually order it to pay. It has produced its income statement and balance sheet for the financial year ended 31 December 2004. These show it has net assets of RM3,647,240 as at 31 December 2004. The defendant also points out that it is a wholly owned subsidiary of Zecon Engineering Berhad, a public company listed on the Second Board of Bursa Malaysia Securities Bhd, which company has net assets of RM79,727,589 and on a group basis has net assets of RM91,080,840.

[48] Mr Sim contends that a further reason to refuse the plaintiff the injunctions it seeks is that in arguing the plaintiff's case, it has become exceedingly clear from Mr Sandhu's submissions that to obtain its injunctions the plaintiff relies heavily on a case made out in trespass against the defendant. But Mr Sim says that the plaintiff does not have any claim in trespass against the defendant which the defendant strenuously denies in any event, as it has been given possession of the sub-sub contract site by the main contractor and retained control of it, and the plaintiff did not plead a claim in trespass nor allege it in its affidavits. Further, Mr Sim points out that the plaintiff has never pleaded that it is entitled to or given exclusive possession of the sub-sub contract site which, on the facts of this case, could not be granted to the plaintiff, given the fact that the plaintiff is only one of the sub-sub contractors of the defendant working on the site along with the defendant's own workers and other sub-contractors' workers or that of the main contractor's.

[49] Before turning to consider the merits of the plaintiff's application and the submissions of the parties, I should state that the approach I intend to

take in deciding this application is that set out for my guidance in *Keet Gerald Francis Noel John v Mohd Noor Abdullah & Ors* [1995] 1 MLJ 293. The principles stated in that case are so well known and have been applied by our courts in so many cases that no purpose would be served to repeat them here.

ARE BONA FIDE SERIOUS ISSUES DISCLOSED?

[50] While reading the pleadings and the affidavits filed by the parties as well as the submissions of counsel, I have kept in mind that the pleadings and evidence are incomplete at this stage, in that, amendments can still be applied for. This is particularly so with regard to Mr Sim's attack on the plaintiff's pleadings and his contention that the plaintiff has not pleaded a case in trespass and so have no peg to hang its claim for the protection of an injunction. Counsel for both parties have presented nice legal arguments about whether the plaintiff has pleaded a case in trespass, whether the plaintiff has shown it has exclusive possession of the sub-sub contract site, whether there has been trespass and whether the court will as a matter of course grant an injunction to restrain a continuing trespass of a possessory right without regard to the question of damages. On the disputed facts which I have earlier mentioned, these arguments concern matters which clearly give rise to *bona fide* serious issues which are required to be tried. However I should indicate that while Mr Sandhu, counsel for the plaintiff has urged me to grant the injunctions sought by the plaintiff as a matter of course in view of the defendant's alleged continuing trespass at the site of the disputed works, I should point out that the defendant strenuously disputes that it is a trespasser and in fact asserts that it has exclusive possession of the sub-sub contract site and so cannot be a trespasser. At this stage of the proceedings I am not in a position to express a view on whether the defendant is a trespasser and guilty of a continuing trespass or whether the plaintiff can be regarded as having possessory rights to the site of the disputed works. Accordingly I have not found the three cases which Mr Sandhu relies on, ofany assistance to the plaintiff at this stage of the proceedings. I say so because in both *Woollerton*'s case and *John Trenberth*'s case the court granted an injunction to restrain a continuing trespass which was admitted, so much so that if the injunction sought there was not granted it would have amounted to the court allowing the trespass to continue. That is not the case here where the allegation of trespass is denied and disputed by the defendant. The case of *Concrete Construction (NSW) Pty Ltd* was a case in which the court granted the injunction only after a full trial, which is not the case here.

[51] From the totality of the facts presented to the court, I find that *bona fide* serious issues have been disclosed which are required to be tried. These issues may be identified as being:

(i) whether the plaintiff is entitled to exclusive possession of the site of the disputed works; this issue is closely related to the next issue;

(ii) whether the defendant is a trespasser or has interfered with the plaintiff's alleged rights of possession to the site of the disputed works;

(iii) whether the taking over of the disputed works by the defendant was unlawful;

(iv) whether the defendant is entitled to impose liquidated and ascertained damages in accordance with the sub-sub contract amounting to RM22.1 million for late completion, including the disputed works taken over by it;

(v) whether there is a total sum of RM3.1 million owing to the plaintiff by the defendant in respect of works executed by the plaintiff.

JUSTICE OF THE CASE

[52] In considering where the justice of the case lies I take into account the following matters:

PRACTICAL REALITIES

[53] The practical realities of the case before me shows that first, in respect of that component of the sub-sub contract consisting of the infrastructural related works and external works, there is no allegation or complaint raised by the plaintiff that it has been dispossessed of these works or that it is being denied access to the site on which these works are being executed. So there is no justification for the grant of an injunction in respect of them.

[54] Secondly, the defendant has taken over the disputed works for a good seven months now. During that time it has already completed all the work that is necessary to finish the aluminium windows and glazing works in the CSD building. Therefore, there can be no justification to grant an injunction in respect of these works.

[55] Thirdly, during the time the defendant has taken over the FRST-EL building it has put in its own workers and appointed other sub-contractors to execute the work and by all accounts, particularly from the 'before and after' photos exhibited by the defendant, good progress seems to have been made which the defendant estimates at 75% completion. It is undeniable that it is in the best interest of both the plaintiff and the defendant that the FRST-EL building be completed as soon as possible since there are completion dates specified in the main contract as well as the sub-contract. It is not in the interest of either party that there should be any further delay to the completion of these works as this dispute arises in the context of a construction contract where the completion of sectional work has been sub-contracted out. In the circumstance there is a high likelihood that any dispute, disruption, stoppage

or delay concerning such sectional works will not only affect the progress of work undertaken by the immediate parties to the dispute but also the work progress of other contractors. As things presently stand, the works are in the hands of the defendant and progressing well. If an injunction is granted to the plaintiff it will definitely result in the defendant having to cease and abandon all its works, withdraw all its workers and that of its sub-contractors from the FRST-EL building site and deliver possession to the plaintiff, which would in turn trigger the knock-on effect referred to by Mr Sim, which would surely cause great hardship to the defenda site. Apart from the knock-on effect which Mr Sim refers to, if an injunction nt, its sub-contractors and the 100 or so workers on is granted and the plaintiff is to take over the works on the FRST-EL building, I envisage difficulties and even disputes arising between the plaintiff and defendant over the measurement of works and materials on site which will inevitably lead to further delay in the progress of the works. This is not a case where the defendant has just taken over the works for only one or two days or even one or two weeks when one would not expect too much progress in the works. This is a case where the defendant has been executing the works for some seven months now.

[56] Fourthly, it should not be overlooked that the plaintiff says that it began to negotiate with the defendant to take over the disputed works because it 'encountered several contractual problems with the defendant on the execution' of the disputed works (see para 18 of Wong Diong Chai's affidavit of 19 May 2005). The plaintiff did not say what these problems were but whatever they were there is no evidence before me to suggest that those problems have been resolved, overcome or sorted out. If an injunction is granted and the FRST-EL building works are handed back to the plaintiff there is no assurance that those same problems which the plaintiff previously encountered would not resurface, leading to a stalemate between the parties and the disputed works coming to a grinding halt.

[57] Fifthly, if the injunction is refused the plaintiff can still proceed with its claims against the defendant for the amounts it has already quantified, as well as for damages. Its claim against the defendant remains intact particularly so as a joint inspection has already been conducted to measure the materials on site. Even though there may be disputes between the parties on these measurements, they nevertheless exist and can form the basis of evidence to be acted on by the court.

CONDUCT OF THE PARTIES

[58] The plaintiff complains that the defendant has behaved in an unreasonable, unjust and oppressive manner towards the plaintiff. I do not find this to be so. The dispute between the parties arises in the context of a construction contract and it is usual for such contracts to provide for a completion date for the works undertaken and for the payment of liquidated and ascertained damages

in the event of delayed completion. On the facts of this case I do not think the defendant's assertion of a contractual right can be characterised as oppressive conduct. Its assertion must still be proved and adjudicated upon. The plaintiff complains that the defendant has unlawfully taken over the disputed works. The defendant seriously disputes that it has so acted.

[59] The court is not permitted to express any view on this allegation which is a matter for trial. However, since the plaintiff has brought the conduct of the defendant into question, it should be pointed out that the plaintiff's own conduct in this dispute is not above reproach. The defendant alleges that the plaintiff was the party that 'baited' (to borrow Mr Sim's expression) it into taking over the disputed works when it informed the defendant on 13 November 2004 that it would cease all works and immediately demobilise in respect of the disputed works. Now that it finds itself in a vulnerable position, through no small measure of its own manoeuvrings, it does not lie in the mouth of the plaintiff to accuse the defendant of oppressive conduct.

[60] The discretion which the court exercises in the grant or refusal of an injunction is an equitable one. The court is always sensitive to the conduct of the parties before it, and it is well accepted that he who seeks equity must do equity. Here the facts show that the plaintiff allowed the defendant to take over the disputed works and was fully aware of what the defendant was doing. It stood by for some five months before coming to court and has not said a word about why it waited so long. Having allowed the defendant to take over and get on with the disputed works for five months, the plaintiff tried to disrupt the defendant's works by blocking the only entrance to the FRST-EL building site. The plaintiff says that its action was merely to reassert control and possession of the site and that the ingress and egress of workers was not affected by its action. If that is what the plaintiff really intended, could it not be achieved without having to dig a trench across the only entrance to the site? The fact that the plaintiff went to such an extent shows that it was bent on putting pressure on the defendant through the disruption of its works. The plaintiff has not come to court with clean hands.

UNDERTAKING IN DAMAGES

[61] As I mentioned earlier, this injunction is sought in the context of a construction contract. The value of the sub-sub contract works is not a small amount. And the amounts being claimed and counter-claimed by the plaintiff and the defendant are not meagre amounts either. They run into millions. The defendant has challenged the plaintiff about its financial standing and its ability to meet its undertaking in damages. Despite this challenge and despite the defendant's revelation to the court that the last audited accounts of the plaintiff which were filed at the Companies Commission dates back to as long ago as 31 December 1999, the plaintiff steadfastly refuses to reveal its financial standing. Instead Mr Sandhu says the justice of the case is so overwhelmingly

in favour of the plaintiff that it overrides any doubts the court may have about the plaintiff's ability to meet its undertaking in damages, so much so that the court can dispense with such an undertaking.

[62] While I accept that in an appropriate and deserving case the court can take the course suggested by counsel, from the matters I have already discussed earlier it must be apparent by now that this is not a case where the justice of the case is overwhelmingly in favour of the plaintiff. The opposite is the case. In the light of what I have just said about the context in which this dispute arises, the value of the sub-sub contract works and the sums being claimed by the parties, the plaintiff's undertaking in damages assumes a position of importance in the weighing of all relevant matters by the court. Even though the plaintiff says that its ability to repay the advance payment of RM4.8 million which it received from the defendant demonstrates its financial standing, I do not think it is such an indication because the repayment was by way of deductions from the monthly progress payments received by it. The plaintiff also says it has a claim of RM3.1 million against the defendant which it can look to, to meet its undertaking in damages. I find this an unconvincing argument because the defendant denies and disputes that there is such an amount owing to the plaintiff.

[63] In the face of the plaintiff's refusal to disclose its financial means I must hold that the plaintiff has not satisfied me that it is well able to meet its undertaking in damages. Turning to the defendant's financial position, I am satisfied from the evidence it has produced that it would be in a financial position to meet any award in damages which the court may eventually award against it, if the injunction is refused.

[64] After weighing all the matters I have mentioned above I find that the defendant would suffer greater injustice by the grant of the injunctions sought, than by its refusal. In the result I dismiss the plaintiff's application for injunctive relief with costs.

Application dismissed with costs.

Reported by Lai Fui Sim